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No. 75-1189

In the Supreme Court of the United States

OCTOBER TERM, 1975

LEWIS T. MOORE, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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This is a suit for damages brought by a former Air Force officer against his former superior officers for allegedly violating his First Amendment rights by transferring him from his duty assignment.

In 1970, the Air Force assigned petitioner, then a Captain in the regular Air Force, to a tour of duty as an instructor at the Air Force Academy.[1] In February 1973, petitioner wrote letters to various members of Congress in which he criticized Academy policies and practices. On March 13, 1973, he was advised by his superior that the Academy was aware of the letters but that no adverse action would be taken against him as a result of the letters. Petitioner subsequently was removed from his position as an instructor and reassigned. He then requested

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[1]This brief statement of the facts is taken from the opinions of the court of appeals (Pet. App. 2a-4a), and the district court (Pet. App. 10a-12a).

redress under Article 138, Uniform Code of Military Justice; his commanding officer denied the request. The Superintendent of the Academy and the authorized designee of the Secretary of the Air Force subsequently upheld the denial.

Petitioner then commenced this suit against his superior officers, alleging that their decision to transfer him was made in retaliation for his exercise of First Amendment rights. He sought money damages under 42 U.S.C. 1985 and also requested that his transfer be declared invalid and that he be reinstated to his former position.

On the government's motion, the district court dismissed the complaint. The court determined that the complaint failed to state a cause of action under 42 U.S.C. 1985, that there is no implied cause of action for money damages against government officials for violations of First Amendment rights, and that it had no jurisdiction to order reinstatement (Pet. App. 13a-15a).

While the case was pending in the court of appeals, petitioner resigned from the Air Force. The court of appeals thereupon determined that petitioner's requests for declaratory relief and reinstatement were moot (Pet. App. 5a). The court further determined that the district court had lacked jurisdiction over petitioner's claim for damages, and that the military transfer decision in any event represented an exercise of discretion that was not subject to review in the absence of more substantial allegations of abuse than petitioner had made in his complaint (Pet. App. 7a).

1. The court of appeals correctly determined that petitioner's claims for declaratory relief and reinstatement are moot. Since petitioner voluntarily resigned from the Air Force, he effectively waived whatever right he might otherwise have had to reinstatement, and declaratory relief would not now benefit petitioner.

2. The district court correctly determined that petitioner's complaint failed to state a cause of action for money damages. Petitioner apparently concedes that his complaint did not state a cause of action under 42 U.S.C. 1985; he asserts instead an implied right of action, relying upon *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (Pet. 9-10). There is no implied right of action for money damages for an alleged wrongful military transfer.

A military transfer decision is not judicially reviewable, absent a specific statutory provision for review. Cf. *Tennessee* v. *Dunlap*, No. 75-95, argued February 23, 1976. As this Court stated in *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (emphasis supplied):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. *While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.*

In any event, as the court of appeals correctly determined, military officers are not liable in money damages for a wrongful duty assignment.[2] The decision to assign a member of the military to a particular duty involves the exercise of broad discretion that should not be hindered by the threat of liability. The court of appeals was therefore correct in relying upon the "general prohibition against suing federal officers who are acting within the scope of their authority" (Pet. App. 7a). Since duty assignments are within respondents' duties and the actions involve the exercise of a discretionary function, respondents satisfy the traditional test for immunity under *Barr* v. *Matteo,* 360 U.S. 564, 571. The availability of immunity depends, of course, upon a judgment that "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens [resulting from immunity]." *Doe* v. *McMillan,* 412 U.S. 306, 320. In the context of the present case the "individual citizen" was a member of the Armed Forces, and the rights of such persons are "conditioned to meet certain overriding demands of discipline and duty." *Parker* v. *Levy,* 417 U.S. 733, 744. Cf. *Greer* v. *Spock,* No. 74-848, decided March 24, 1976. The chances of recurring harm to such individuals, therefore, are substantially outweighed by the necessity for the uninhibited exercise of discretion on the part of

[2]Although petitioner accuses the court of appeals of declining to consider whether the complaint states a cause of action (Pet. 7-9), the court plainly considered and decided that question (Pet. App. 6a):

> [T]he allegations are not sufficient to allow this court to interfere with the authorized exercise of discretion by Air Force officials * * *.

military officers making duty assignments. Cf. *Orloff* v. *Willoughby, supra.* It follows that respondents were entitled to immunity in this case and that no cause of action for money damages should be implied. Cf. *Imbler* v. *Pachtman,* No. 74-5435, decided March 2, 1976.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

[3]Petitioner also contends (Pet. 10) that the court of appeals incorrectly concluded that the $10,000 requirement of 28 U.S.C. 1331 had not been met. Since there was in any event no cause of action, this jurisdictional question is not determinative of petitioner's claim. But since petitioner's transfer did not affect his grade or salary (Pet. App. 7a), and his alleged First Amendment rights standing alone do not meet the jurisdictional requirement (*Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547), it appears legally certain that petitioner's claim would not exceed $10,000. See *Goldsmith* v. *Sutherland,* 426 F.2d 1395 (C.A. 6), certiorari denied, 400 U.S. 960.